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IN THE
SUPREME COURT OF THE UNITED STATES

RONALD MICHAELS AND
DOLORES MICHAELS,

Petitioners,

v.

TOWNSHIP OF MACOMB,

Respondent.

On Petition for a Writ of Certiorari to the State of Michigan Supreme Court

BRIEF IN REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioners Ronald Michaels and Dolores Michaels submit this Reply Brief to address issues raised in the Opposition to Petition for Writ of Certiorari ("Opposition Brief") filed by Respondent the Township of Macomb, Michigan in accordance with Sup. Ct. R. 15.6 permitting a reply brief for that purpose.

Respondent's Opposition Brief focuses on matters which occurred after Petitioners filed their petition for a writ of certiorari, particularly the decision of the Macomb County Circuit Court ("the circuit court") on July 18, 2008 ordering that Petitioners be incarcerated. While Respondent's Opposition Brief is replete with factual misstatements unsupported by record evidence, it does not address the constitutionality of the circuit court's deprivation of Petitioners' constitutional rights. Instead, Respondent argues that Petitioners were not entitled to due process and questions this Court's jurisdiction to review this petition.

In the Introduction Respondent sets forth its version of the underlying litigation, which began in 1995. While Respondent asserts that Petitioners' commercial composting operation was "illegal," importantly no tribunal ever agreed with Respondent or found that Petitioners' operation was illegal in any way. Indeed, Respondent had brought the underlying action merely as a nuisance claim. Compliance with the Michigan Right To Farm Act ("RFTA"), codified as M.C.L. 286.471 *et seq.*, and the Generally Accepted Agriculture Management Practices ("GAAMPs"), developed pursuant to the RFTA, is voluntary, not mandatory. It simply offers Michigan farmers a bar against nuisance lawsuits. There are no penalties for non-compliance, as it does not violate any law.

While Respondent claims that the Michigan Department of Environmental Quality issued environmental violations and took enforcement action against Petitioners, Respondent neglects to mention that the purported enforcement action (Case No. 2004-451-CE) was dismissed with prejudice by the Ingham County, Michigan Circuit Court, with **no** finding of liability whatsoever on the part of Petitioners and no imposition of fines, penalties or other punitive or remedial action.

Although Respondent asserts that Petitioners have done little to comply with the consent judgment, its only "support" is the deposition testimony of Petitioner Dolores Michaels taken on **December 7, 2006** in a completely unrelated case, in which she stated that she had approximately 250,000 cubic yards of finished compost on the site as of October 31, 2006. On **January 3, 2008**, Respondent filed its motion for contempt based on this testimony of *fourteen months earlier*, and claimed that "upon information and belief" that same material was still there after December 31, 2007. Respondent did absolutely nothing to verify that there was anything on site on January 1, 2008, and neither Respondent's counsel nor anyone from the Township ever visited the site at all until four months later.

After Petitioners filed their petition with this Court, Respondent brought a motion to incarcerate Petitioners, asserting again that they failed to comply with the consent judgment (Reply App., 1a – 4a). As with Respondent's first contempt motion, this motion failed to comply with the state court rules governing contempt proceedings. The circuit court lacked jurisdiction to consider the motions and abused its discretion and violated Petitioners' due process rights when it held Petitioners in contempt of court and when it

ordered Petitioners incarcerated without an evidentiary hearing or a determination as to whether Petitioners could comply with the contempt orders or the character and magnitude of the harm threatened by continued contumacy.

REPLY STATEMENT OF FACTS

1. Petitioners incorporate the Statement of Facts from their Petition for Writ of Certiorari herein by reference.

2. On March 28, 2008, Respondent filed with the Macomb County Circuit Court a motion to incarcerate Petitioners, stating that, "[o]n information and belief, Defendants [Petitioners] have done nothing to comply with this court's order requiring Defendants to remove all compostable materials from their property in Macomb Township" (Reply App., 1a – 4a). No affidavit or other evidence supported this motion. It merely contained unsworn assertions made by counsel for Respondent, who had never at any time even been to the site. The circuit court never held an evidentiary hearing on Respondent's allegations.

3. On April 9, 2008, Petitioners filed their response (Reply App., 5a – 19a), which points out the complete lack of evidence supporting Respondent's motion, and raises the circuit court's lack of jurisdiction to consider the motion and the violation of their due process rights. The circuit court ignored these constitutional concerns and ordered Petitioners incarcerated for 30 days (Opposition Brief, App. at 11a - 15a). Despite the record evidence that the alleged compostable materials on the site were brought on after December 31, 2007 from the almost 300 non-composting site-acres of the farm to turn the former 30-acre composting site into a planted farm field, the circuit court

held that the presence of leaves on the site (which is next to a forest) violated the consent judgment. The order itself contains factual errors, such as mandating that a "berm" parallel and right next to "Card Road" be removed, even though Card Road does not run parallel to the property and is a mile away from the site, making compliance with the order utterly impossible.

REASONS FOR GRANTING THE PETITION

This Court has long upheld the guarantees in the Fifth and Fourteenth Amendments to the United States Constitution that a person shall not be deprived of liberty or property without due process of law. These guarantees extend to proceedings alleging contempt outside the immediate presence of a court, particularly where the penalties include incarceration.

Yet it is undisputed that Petitioners were deprived of their property through monetary fines and their liberty through incarceration without the circuit court ever holding an evidentiary hearing or having before it any evidence whatsoever to support Respondent's allegations that Petitioners were in contempt of a term in the consent judgment. Petitioners have no other recourse for this deprivation of their constitutional rights except through review by this Court. The state court rulings in this case clearly decide an important question of federal constitutional law in a way that directly conflicts with decisions of this Court, and accordingly, Petitioners respectfully request that this Court grant their petition.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE RULINGS OF THIS COURT

In their petition, Petitioners maintained that Michigan's failure to hold an evidentiary hearing or require the submission of relevant and admissible evidence before finding Petitioners in contempt for allegedly not complying with a term in the consent judgment is incompatible with this Court's decisions upholding the guarantees found in the Fifth and Fourteenth Amendment of due process in contempt proceedings.

Respondent's Opposition Brief never addresses this issue. Instead, Respondent sets forth a lengthy recitation of "facts" (with which Petitioners disagree) unrelated to whether Michigan's failure to hold any kind of evidentiary hearing - or afford even the slightest measure of due process to Petitioners - was incompatible with this Court's decisions upholding the constitutional guarantees of due process in state court contempt proceedings. Respondent also does not address this Court's rulings as to the requisite due process for contempt allegedly occurring outside the immediate presence of a court. This Court has stated that "[s]ummary adjudication of indirect contempts is prohibited." *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 833 (1994) (citing *Cooke v. United States*, 267 U.S. 517, 534 (1925)). This Court affirmed in *Pounders v. Watson*, 521 U.S. 982 (1997), that a party facing a charge of contempt is entitled to due process through a hearing, the presence of counsel and an opportunity to call and examine witnesses. In prior rulings this Court limited summary contempt orders, in which the party is not afforded a due process evidentiary hearing, only to cases in which the party

committed misconduct in the presence of the court which disturbed the court's business. *See Pounders* (and cases cited therein at 521 U.S. at 988). This Court's rulings clearly provide that Petitioners were entitled to due process before the circuit court found them in contempt and ordered that they be fine and incarcerated.

The circuit court's order on July 18, 2008 that Petitioners be incarcerated for 30 days cannot be seen as anything other than a criminal sanction under this Court's decisions in *Bagwell*, 512 U.S. at 826-27 and *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911). Respondent admits that Petitioners were not afforded an evidentiary hearing, but asserts that the circuit court was not required to conduct an evidentiary hearing because Petitioners admitted the contempt. Petitioners never made any such admission. Indeed, the only evidence in the record is the unrebutted affidavit of Renee Michaels which proves a lack of contempt. Respondent does not contend that Petitioners themselves made the alleged "admission," but instead refers to what at best could be described as a comment purportedly made by counsel at a motion hearing, which cannot be viewed as evidence.

More importantly, Respondent fails to cite any legal authority for this contention. Respondent's position directly conflicts with this Court's decision in *Pounders*. Even where a defendant has confessed to a crime, that defendant is still entitled to due process and a trial by jury. This Court has never held that a criminal defendant's confession renders a jury trial unnecessary or permits a summary conviction and sentencing without benefit of a jury trial or other due process. There simply is no authority which supports Respondent's argument that Petitioners were not entitled to due process.

Since Respondent does not address the fact that Michigan's failure to hold an evidentiary hearing or require that the record contain any relevant and admissible evidence before finding Petitioners in contempt for allegedly not complying with a term in the consent judgment is incompatible with this Court's decisions upholding the guarantees found in the Fifth and Fourteenth Amendment of due process in contempt proceedings, Petitioners' basis for submitting their petition to this Court remains uncontroverted. Petitioners therefore respectfully request that this Court grant their petition.

II. THIS COURT SHOULD GRANT REVIEW TO HALT MICHIGAN'S UNCONSTITUTIONAL FINDING OF CONTEMPT WITHOUT DUE PROCESS AND BECAUSE THE DECISION BELOW IS WRONG

A. The Circuit Court Lacked Jurisdiction Over Petitioners Because Respondent Failed To Comply With The State Court Rules As To Contempt Proceedings

As with its earlier motion, Respondent again failed to comply with M.C.R. 3.606 when it brought its motion to incarcerate Petitioners. Under M.C.R. 3.606, a contempt proceeding must be initiated by an ex parte motion supported by affidavits, from which the court orders the accused contemnor to show cause there should not be a finding of contempt. *In re Contempt of Robertson*, 209 Mich. App. 433, 438-39, 531 N.W.2d 763 (1995); *In re Contempt of McRipley*, 204 Mich. App. 298, 301, 514 N.W.2d 219 (1994); *In re Contempt of Nathan*, 99 Mich. App. 492, 495, 297 N.W.2d 646 (1980). But in this case, Respondent had

no supporting affidavits, nor did an order to show cause issue, as required by M.C.R. 3.606(A). Instead, Respondent merely alleges "upon information and belief" that Petitioners are in contempt of the consent judgment. This procedural failure in both contempt proceedings is fatal and compels a ruling that the circuit court lacked jurisdiction over both motions seeking an order holding Petitioners in contempt. *S. Abraham & Sons, Inc. v. Dept. of Treas.*, 260 Mich. App. 1, 24 n. 11, 677 N.W.2d 31 (2003). Under Michigan law, lack of subject matter jurisdiction renders a judgment void. *In re Hatcher,* 443 Mich. 426, 438, 505 N.W.2d 834 (1994); *In re Hague,* 412 Mich. 532, 315 N.W.2d 524 (1982).

Additionally, Respondent committed other procedural defects in its motion. Respondent's motion did not state whether the alleged contempt was criminal or civil in nature; Respondent failed to serve its motion on Petitioners personally. These constitute procedural defects which taint the proceeding and mandate that the orders of contempt be reversed. *S. Abraham & Sons, Inc.*, 260 Mich. App. at 24 n.11; *In re Contempt of Steingold*, 244 Mich. App. 153, 158, 624 N.W.2d 504 (2000); *In re Contempt of Auto Club Ins Ass'n*, 243 Mich. App. 697, 716, 624 N.W.2d 443 (2000); *In re Contempt of Robertson,* 209 Mich. App. at 438.

Respondent never addresses whether the circuit court had jurisdiction to hear either contempt motion, but instead, argues that Petitioners failed to raise the issue with the circuit court and that this Court accordingly has no jurisdiction. This argument lacks any merit. Review of Petitioners' response to Respondent's motion (Reply App. at 5a – 19a) shows that Petitioners did raise these constitutional concerns with the circuit court, which simply ignored them.

As Respondent's only argument on this issue is without record support, Petitioners' submission that the circuit court lacked jurisdiction remains uncontroverted. Accordingly, Petitioners respectfully request that this Court grant their petition.

B. The Circuit Court Abused Its Discretion And Violated Petitioners' Due Process Rights When It Ordered Incarceration Absent An Evidentiary Hearing

Under Michigan law, contempt of court is a willful act, omission, or statement that tends to impair the authority or impede the functioning of a court. *In re Contempt of Auto Club Ins. Ass'n.*, 243 Mich. App. at 697; *In re Contempt of Robertson*, 209 Mich. App. at 436; *Pontiac v. Grimaldi*, 153 Mich. App. 212, 215, 395 N.W.2d 47 (1986). A trial court must afford the alleged contemnor due process before it can hold a party in contempt. *In re Collins*, 329 Mich. 192, 196, 45 N.W.2d 31 (1950); *In re Contempt of Auto Club Ins. Ass'n.*, 243 Mich. App. at 711-13; *In re Contempt of Robertson*, 209 Mich. App. at 438, 440; *Fraternal Order of Police, Lodge #98 v. Kalamazoo Co.*, 82 Mich. App. 312, 315-16, 266 N.W.2d 805 (1978); *In re Henry*, 32 Mich. App. 654, 659, 189 N.W.2d 96 (1971).

The hearing in a contempt proceeding must be more than a summary proceeding or oral argument of counsel on a motion, and must employ the rules of evidence. *In re Contempt of Robertson*, 209 Mich. App. at 439. The standard of proof is more stringent than in other civil actions; proof must be clear and unequivocal. *People v. Matish*, 384 Mich. 568, 572, 1984 N.W.2d 915 (1971); *In re Contempt of*

Robertson, 209 Mich. App. at 439; *Detroit Bd. of Ed. v. Detroit Federation of Teachers*, 55 Mich. App. 499, 505-06, 223 N.W.2d 23 (1974). Thus, where an order of contempt was based on the representations of the plaintiff's counsel made at a motion hearing (as Respondent alleges occurred in this case) instead of issuing after an evidentiary hearing, the state court found that there was not sufficient evidence to support the order of contempt because the factfinder could not gain personal knowledge of the contempt. *In re Contempt of Robertson*, 209 Mich. App. at 440-41.

It is undisputed in this case that the circuit court did not hold an evidentiary hearing before holding Petitioners in contempt on February 27, 2008 order or ordering their incarceration on July 18, 2008. The circuit court had no evidence before it to support Respondent's motions. Although the circuit court went to the site, it did not take any evidence or conduct any proceeding there. There was nothing in the record to refute the sworn affidavit of Renee Michaels that the material present on the site at the time of the circuit court's visit (more than six months after Petitioners had fulfilled the consent judgment and had begun to reclaim the land as a farm field) was fertilizing material brought on the site in 2008 from other parts of the farm (as the circuit court's opinion reflects), an action which would not violate the consent judgment.

Notwithstanding the complete lack of evidence, the circuit court determined that there was a "berm" parallel and next to "Card Road" that had "yard compost" in it, and that "yard compost" was spread throughout the area (this term does not appear in the consent judgment). However, there could not be a berm parallel to Card Road on Petitioners' site

- the 30-acre parcel is parallel to North Avenue, not Card Road, which is a mile away from the site. There was no evidence that a "berm" of "yard compost" was present on January 1, 2008 and or that anything on site was "compostable material" from the "composting operation." Indeed, nothing in the consent judgment prohibits Petitioners from reclaiming the site by turning it into a field for crop production. There was no evidence from which the circuit court could rule that Petitioners be held in contempt and fined or incarcerated.

Likewise, because of the lack of evidence the circuit court could not know whether it was possible for Petitioners to comply with its orders, particularly the incarceration order. Since the order's own language as to "Card Road" made compliance impossible (the circuit court never amended or corrected that order), the order can only be seen as punitive and the proceedings criminal in nature. Petitioners thus were entitled to the heightened constitutional protections beyond an evidentiary hearing as afforded in criminal proceedings, such as a jury trial.

Respondent does not counter this position, but instead argues that the circuit court personally observed the "contempt" when it conducted a site visit on June 30, 2008, perhaps trying to analogize to a "direct" contempt. But the alleged contempt still would not have occurred in open court in the court's immediate presence, disrupting the court's business, as required in this Court's decision in *Pounders*. Respondent bore the burden of proving Petitioners' contempt, but failed to meet this burden. Even the circuit court's visit on June 30, 2008 could not establish whether compostable materials were present on the site on January 1, 2008, nor could it rebut the affidavit.

Accordingly, because the circuit court did not afford Petitioners due process by conducting an evidentiary hearing or receiving evidence supporting either contempt motion, the circuit court abused its discretion and violated Petitioners' constitutional rights. Petitioners therefore respectfully request that this Court grant their petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners
Ronald Michaels and Dolores Michaels

SEPTEMBER 2008

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

MACOMB TOWNSHIP,

Plaintiff,

Case No. 95-4372-CZ

v

Honorable Diane Druzinski

RONALD MICHAELS AND DOLORES MICHAELS,

Defendants.

TOWNSHIP OF MACOMB'S MOTION FOR ORDER INCARCERATING RONALD AND DOLORES MICHAELS AND REQUIRING DEFENDANTS REIMBURSE TOWNSHIP'S FEES AND COSTS

The Township of Macomb ("Township"), by and though its attorneys, Seibert and Dloski, PLLC, for its motion states as follows:

1. On February 27, 2008, this court issued an Opinion and Order finding Ronald and Dolores Michaels in contempt of the June 30, 2004 consent judgment.

2. The court's Opinion and Order, in part, stated as follows:

> For the foregoing reasons, Plaintiff's motion for an order finding Ronald and Dolores Michaels in contempt is GRANTED. Defendants shall pay, collectively, a fee of $250.00 per day after December 31, 2007 that they have not removed all compostable materials from their property. It is further ordered that Defendants shall both serve time in jail after thirty (30) days of this Opinion and Order if they have continued to fail to comply with its terms. Finally, the court orders Defendants are liable for Plaintiff's fees and costs for bringing the instant motion. Plaintiff shall submit an itemized bill of costs.

3. On information and belief, Defendants have done nothing to comply with this court's order requiring Defendants to remove all compostable materials from their property in Macomb Township.

4. Instead, Defendants on or about March 7, 2008 filed a Claim of Appeal with the Court of Appeals.

5. With Defendants' Claim of Appeal, Defendants filed a Motion for Peremptory Reversal, Motion for Stay, and Motion to Waive the Transcript Requirements.

6. Defendants also filed a Motion for Stay of Proceedings with this court.

7. On March 17, 2008, this court heard argument on Defendants' Motion for a Stay of Proceedings. The court entered an order denying Defendants' motion for a stay.

8. On March 27, 2008, the Court of Appeals entered an order dismissing Defendants' Claim of Appeal, Motion for Immediate Consideration, Motion for Peremptory Reversal, Motion for Stay and Motion to Waive the Transcript Requirement. The Court of Appeals' order is attached as Exhibit 1.

9. The basis for the Court of Appeals' order dismissing Defendants' pleadings based on the fact that this court's Opinion and Order finding Defendants in contempt was not a final order.

10. Presumably, Defendants will now file an Application for Leave to the Court of Appeals. However, it is apparent that Defendants' Application for Leave to Appeal, if filed, will have no merit.

11. Defendants made the Court of Appeals well aware that Defendants would be subject to incarceration commencing March 27, 2008. If the Court of Appeals felt there was any merit to Defendants' position, the Court of Appeals could have treated Defendants' Claim of Appeal as an Application for Leave to Appeal and grant the application. The fact that the Court of Appeals chose not to proceed in that manner is very significant evidence that the Court of Appeals would not entertain Defendants' Application for Leave to Appeal.

12. On March 28, 2008, Defendants filed an emergency motion for leave to appeal with the Court of Appeals.

13. Counsel for the Township was advised by the Court of Appeals that the court would decide the application on March 28, 2008, and the Township should have a response to the Court of Appeals no later than 1:00 p.m. on March 28, 2008.

14. On March 28, 2008, at approximately 4:00 p.m., the Court of Appeals, by facsimile, issued an order denying Defendants' application for leave to appeal. The Order is attached as Exhibit 2.

15. The Court of Appeals affirmed this court's finding that Defendants were in contempt for failure to comply with the consent judgment.

16. The Township filed an itemized bill of costs.

17. Defendants filed objections to the Township's bill of costs.

18. Defendants' objections are based on the fact that "Dloski was very familiar with the facts and proceedings that led up to preparation for the motion for contempt." Defendants' objections are without merit and frivolous, as usual.

WHEREFORE, Macomb Township respectfully requests this court enter an order incarcerating Ronald and Dolores Michaels and requiring Defendants to reimburse the Township's fees and costs within seven (7) days from the motion hearing date.

/s/ Lawrence W. Dloski
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Dated: March 28, 2008

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

MACOMB TOWNSHIP,

Plaintiff,

Case No. 95-4372-CZ

v

Honorable Diane Druzinski

RONALD MICHAELS and DOLORES MICHAELS,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO INCARCERATE DEFENDANTS RONALD MICHAELS AND DOLORES MICHAELS

Defendants, Ronald Michaels and Dolores Michaels, by and through their counsel, The Victor Firm, PLLC, hereby submit this response to plaintiff, Township of Macomb's motion to incarcerate defendants, and in response to Plaintiff's motion, state as follows:

1. Admit that this Court's February 27, 2008 Opinion and Order speaks for itself.

2. Admit that this Court's February 27, 2008 Opinion and Order speaks for itself. Defendants further aver that the Court of Appeals, in its March 28, 2008 Opinion modified the Circuit Court ruling.

3. Denied.

4. Defendants admit that they filed a Claim of Appeal with the Court of Appeals on March 7, 2008, which Claim of Appeal was dismissed for lack of jurisdiction. Defendants then filed on March 28, 2008, an Application for Leave to Appeal to the Court of Appeals, which Application was granted by Order dated March 28, 2008, modifying in part the trial court's Opinion and Order.

5. Defendants admit that they filed on March 11, 2008, a Motion for Peremptory Reversal, and filed on March 18, 2008, a Motion for Stay of Proceedings and a Motion to Waive the Transcript Requirement.

6. Defendants admit that on March 10, 2008, defendants filed a Motion for Stay of Proceedings with this Honorable Court.

7. Defendants admit that on March 17, 2008, this Honorable Court denied Defendants' Motion for Stay of Proceedings.

8. Defendants admit that their Claim of Appeal with the Court of Appeals was dismissed for lack of jurisdiction on March 27, 2008.

9. Defendants admit that the Court of Appeal's March 27, 2008 Order speaks for itself.

10. Defendants admit that part of the allegation which states that an Application for Leave to Appeal will be, and was indeed, filed on March 28, 2008. The Application for Leave to Appeal was granted by Order dated March 28,

2008, modifying, in part, the trial court's Opinion and Order. Defendants deny that part of the allegation which states the Application for Leave to Appeal "will have no merit".

11. Defendants deny plaintiff's allegations in total.

12. Defendants admit they filed an emergency motion for leave to appeal with the Court of Appeals on March 28, 2008.

13. Defendants neither admit nor deny the allegations contained herein for the reason they lack knowledge or information sufficient to form a belief, and leave plaintiff to its proofs.

14. Defendants admit the Court of Appeals issued its order modifying, in part, the trial court's February 27, 2008 opinion and order, and the Court of Appeals March 28, 2008 Order speaks for itself.

15. Denied. Defendants aver the Court of Appeals March 28, 2008, Order modifying, in part, the trial court's February 27, 2008 opinion and order speaks for itself.

16. Defendants admit plaintiff filed an itemized Bill of Costs, which Bill of Costs was not verified.

17. Defendants admit that on March 21, 2008, Defendants file objections to plaintiff's Bill of Costs.

18. Defendants deny the allegations as stated herein for the reason they are untrue as alleged. Defendants objected to plaintiff's Bill of Costs for the reason same were unverified, as required by MCR 2.625(G), and, further, it

contains no statement averring that the facts and allegations contained in the submitted Bill of Costs are true, or believed to be true, upon information and belief and under penalty of perjury. Defendants further objected for the reason the fees charged were excessive. (A copy of Defendants' Objections to Plaintiff's Bill of Costs is currently on file with this Honorable Court and will, therefore, be omitted from this motion response.)

WHEREFORE, Defendants, Ronald Michaels and Dolores Michaels, respectfully request that this Honorable Court deny plaintiff's request for an order (a) incarcerating Ronald and Delores Michaels, and (b) requiring Defendants to reimburse the Township fees and costs within seven (7) days from the motion hearing date.

/s/ Cindy Rhodes Victor
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Dated: April 8, 2008

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

MACOMB TOWNSHIP,

Plaintiff,

Case No. 95-4372-CZ

v

Honorable Diane Druzinski

RONALD MICHAELS and DOLORES MICHAELS,

Defendants.

DEFENDANTS' BRIEF IN RESPONSE TO PLAINTIFF'S MOTION TO INCARCERATE DEFENDANTS RONALD MICHAELS AND DOLORES MICHAELS

STATEMENT OF FACTS

On February 27, 2008, this Court issued an Opinion and Order holding that defendants Ronald Michaels and Dolores Michaels ("defendants") were in contempt of court. The Opinion and Order provided for incarceration if defendants were still in contempt after 30 days from the date of the order.

On March 31, 2008, plaintiff filed this instant motion for incarceration. The only allegation that plaintiff asserts in bringing the instant motion is the following:

> 3. On information and belief, Defendants have done nothing to comply with this court's order requiring Defendants to remove all compostable materials from their property in Macomb Township.

Plaintiff attaches no affidavit, photographs, or other tangible evidence to its motion, nor does plaintiff provide the names of any witnesses who could attest to the allegation contained in Paragraph 3. Plaintiff's contention is unsupported by the record, and is untrue.

Defendants have been diligently working on complying with this Court's order. As evidence of this compliance, defendants attach photographs taken of the Rondigo farm site. The photographs attached hereto as "Exhibit A" evidence the state of the farm in 2004, before this Honorable Court issued its February 27, 2008 Opinion and Order. The photographs attached hereto as "Exhibit B" were taken on April 5, 2008, and evidence that defendants are in compliance with this Court's February 27, 2008 Opinion and Order. Defendants state unequivocally that all compostable materials have been removed from the site.

DISCUSSION

I. PLAINTIFF HAS FAILED TO ATTACH EVIDENCE OF ALLEGED CONTINUING CONTEMPT BY DEFENDANTS IN ORDER TO SUPPORT ITS MOTION FOR INCARCERATION OF DEFENDANTS JUSTIFYING DENIAL OF THE MOTION

The only allegation that plaintiff asserts in bringing the instant motion is the following:

> 3. On information and belief, Defendants have done nothing to comply with this court's order requiring Defendants to remove all compostable materials from their property in Macomb Township.

There is no evidentiary basis upon which this Honorable Court may find that defendants continue to be in contempt of court, mandating incarceration as plaintiff requests. Plaintiff's motion fails to contain documentary support from anyone with first-hand knowledge of the facts; the motion contains no affidavit evidence in support of plaintiff's contention, and plaintiff fails to attach photographs or any other documentary evidence from which this Court may find defendants to be in contempt of court. There is no evidence before this Court to support plaintiff's assertion that defendants have not purged the contempt. Accordingly, defendants request this Honorable Court deny plaintiff's motion in its entirety.

II. THIS COURT LACKS JURISDICTION OVER DEFENDANTS SINCE PLAINTIFF FAILED TO COMPLY WITH MCR 3.606 AND OTHER PROCEDURAL REQUIREMENTS

In the event this Honorable Court addresses plaintiff's motion for contempt, considering the assertion that defendants should be held in contempt, defendants submit the motion should be denied in its entirety. Plaintiff has failed to follow the procedures set forth in MCR 3.606 which govern findings of contempt of court. When an alleged contempt of court is committed outside the immediate presence of the court, a party must institute the contempt proceedings with a motion to show cause or support its motion for contempt with an affidavit. Plaintiff has not done so.

Additionally, plaintiff did not fulfill its obligation to advise defendants as to whether the contempt being alleged was criminal or civil in nature. Further, plaintiff did not serve its motion by personal service on defendants, the alleged contemnors, as required when the alleged contempt consists of disobeying an order of the court.

As the court stated in *In re Contempt of Robertson*, 209 Mich App 433; 531 NW2d 763 (1995),

> Contempt proceedings for contempts committed outside the immediate view and presence of the [judge] must be initiated through an ex parte motion supported by an affidavit of facts showing the alleged contemptuous conduct. MCR 3.606(A).

209 Mich App at 438-39. *Accord In re Contempt of McRipley*, 204 Mich App 298, 301; 514 NW2d 219 (1994); *In re Contempt of Nathan*, 99 Mich App 492, 495; 297 NW2d 646 (1980). No such affidavit is attached to plaintiff's motion.

The Court of Appeals in *S. Abraham & Sons, Inc v Dept of Treas*, 260 Mich App 1; 677 NW2d 31 (2003), addressed this very issue, and determined:

> Defendant's alleged disobedience of the Court of Claims order occurred outside the court's presence, requiring compliance with the procedures detailed in MCR 3.606. *Auto Club Ins Ass'n, supra* at 712-713, 718; see also MCL 600.1711. Contrary to MCR 3.606, plaintiffs did not institute the contempt proceedings with a motion to show cause or support their motions for contempt with affidavits (other than an affidavit supporting the amount of attorneys fees requested). As such, the trial court lacked jurisdiction over defendant.

260 Mich App at 24 n.11.

The court in *S. Abraham & Sons, Inc.* also addressed the issues of whether the failure of the plaintiffs in that case to fulfill their obligation to advise the defendant whether the contempt being alleged was civil or criminal in nature and to serve the contempt motion on defendant personally were procedural defects that tainted the contempt hearing,

mandating that the order of contempt be reversed. 260 Mich App at 24 n.11. *Accord In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 716; 624 NW2d 443 (2000); *In re Contempt of Robertson,* 209 Mich App 433, 438; 531 NW2d 763 (1995). The court stated specifically in *In re Contempt of Steingold*, 244 Mich App 153; 624 NW2d 504 (2000):

> Additionally, when contempt proceedings for violating a court order are initiated, the notice or order must be personally served on the alleged contemnor. MCL 600.1968(4); MSA 27A.1968(4); MCR 2.107(B)(1)(b).

244 Mich App at 158.

The proof of service on plaintiff's current motion, including notice of hearing and motion, does not state who was served, and declares that service was made by ordinary mail and by facsimile. Accordingly, defendants submit plaintiff did not appropriately initiate contempt proceedings by filing a motion for an order compelling defendants to show cause as to why defendants should not be held in contempt. That fact, coupled with that lack of an affidavit of someone with personal knowledge respecting the alleged continued contempt as MCR 3.606 requires fatally flaws plaintiff's motion.

Moreover, plaintiff did not state anywhere in its motion whether it the contempt it alleged that defendants committed was civil or criminal in nature and did not personally serve defendants with the contempt motion. Pursuant to . *Williams v Shin,* 111 Mich App 84, 90; 314 NW2d 529 (1981), this Court lacks jurisdiction over

defendants. When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void. *Williams*, at 90; 314 NW2d 529 (1981).

Defendants therefore respectfully request that this Court dismiss plaintiff's motion for lack of jurisdiction, award *defendants* their costs and attorneys' fees for having to defend this improper and vexatious motion, together with such other and further relief as to this Court may seem just and proper under the circumstances.

III. PLAINTIFF'S MOTION VIOLATES DEFENDANTS' CONSTITUTIONAL RIGHT TO DUE PROCESS

In the event this Honorable Court addresses the merits of Plaintiff's motion for contempt, considering the assertion that defendants should be held in contempt and incarcerated for alleged continued contempt, defendants submit the motion should be denied in its entirety. Contempt of court is a willful act, omission, or statement that tends to impair the authority or impede the functioning of a court. *In re Contempt of Robertson*, 209 Mich App 433, 436; 531 NW2d 763 (1995); *Pontiac v Grimaldi*, 153 Mich App 212, 215; 395 NW2d 47 (1986). As the court stated in *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697; 624 NW2d 443 (2000),

> The power to hold a party, attorney, or other person in contempt is the ultimate sanction the trial court has within its arsenal, allowing it to punish past transgressions, compel future adherence to the rules of engagement, *i.e.*, the court rules and court orders, or compensate

> the complainant. *In re Contempt of Robertson*, [*supra*].... Because the power to hold a party in contempt is so great, it "carries with it the equally great responsibility to apply it judiciously and only when the contempt is clearly and unequivocally shown."

243 Mich App at 708 (*citing People v Matish*, 384 Mich 568, 572; 184 NW2d 915 (1971)). The court made clear that

> The trial court must carry out the proper procedures before it can issue the order holding an individual or party in contempt of court in order to carry out its goal of *coercing* particular action or *punishing* a misdeed.

243 Mich App at 711 (emphasis in original).

According to the court in *In re Contempt of Auto Club Ins Ass'n*,

> If the contemptuous conduct occurs outside the court's direct view, *i.e.*, it is "indirect" contempt, the court must hold a hearing to determine whether the alleged contemnor actually committed contempt. This hearing must follow the procedures established in MCR 3.606 and afford some measure of due process before the court can determine whether there is sufficient evidence of contempt to warrant sanctions.

243 Mich App at 712-13. *Accord In re Collins*, 329 Mich 192, 196; 45 NW2d 31 (1950); *In re Contempt of Robertson*, 209 Mich App 433, 438, 440; 531 NW2d 763 (1995);

Fraternal Order of Police, Lodge #98 v Kalamazoo Co, 82 Mich App 312, 315-16; 266 NW2d 805 (1978); *In re Henry*, 32 Mich App 654, 659; 189 NW2d 96 (1971). In *In re Contempt of Robinson*, the court stated:

> These minimal due process safeguards require that an accused be given a reasonable time in which to prepare a defense to the contempt charge.

209 Mich App at 438.

The hearing on an allegation of contempt must be more than summary proceeding or hearing on a motion; the rules of evidence apply at the hearing regarding the contempt charges. *In re Contempt of Robertson*, 209 Mich App at 439. The standard of proof is more stringent than in other civil actions; proof of contempt must be clear and unequivocal. *People v Matish*, 384 Mich 568, 572, 1984 NW2d 915 (1971); *In re Contempt of Robertson*, 209 Mich App 433, 439; 531 NW2d 763 (1995); *Detroit Bd of Ed v Detroit Federation of Teachers*, 55 Mich App 499, 505-06; 223 NW2d 23 (1974). Thus, the court found in *In re Contempt of Robinson* that, where the order of contempt was based on the representations of *plaintiff's counsel* made at a motion hearing and not through an evidentiary hearing, **there was not sufficient evidence to support an order of contempt because the finder of fact had not gained personal knowledge of the contempt** (emphasis added). *In re Contempt of Robertson*, 209 Mich App at 440-41.

The case at bar is on all fours with *In re Contempt of Robertson*. The *only* evidence plaintiff has brought before this Court thus far is counsel's own statement made on information and belief[1]. Such representation of counsel is insufficient evidence of defendants' alleged contempt. As a result, plaintiff's motion should be denied.

Moreover, plaintiff seeks to take away defendants' liberty, perhaps the single-greatest punishment, in the absence of any evidence of continued wrong-doing, without presenting proof of one with personal knowledge, without due process, and without cause. It is well-established that any jail confinement should be a last resort, and considered judiciously. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697; 624 NW2d 443.

Continued contempt and incarceration is conditional upon the contemnor's continuing in his contempt. The party thus has the opportunity to secure his release by purging himself of his contempt. Plaintiff's motion lacks any evidence that defendants are continuing in their contempt. To the contrary, as evidenced by the attached photographs (Exhibits A and B), defendants have purged themselves of the contempt with which they were charged. All compostable material have been removed from the property.

Furthermore, the statute requires that the court find that the defendant is or could be of "sufficient ability" to comply with the contempt order. *Sword v Sword*, 59 Mich App 730, 734; 229 NW2d 907 (1975). Such ability to comply is also prerequisite to a sentence of coercive

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1 "3. On information and belief, Defendants have done nothing to comply with this court's order requiring Defendants to remove all compostable materials from their property in Macomb Township."

commitment. *Borden v Borden*, 67 Mich App 45, 50; 239 NW2d 757 (1976). When the purpose of the court is to coerce compliance, "it must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." *United States v United Mine Workers*, 330 US 258, 303-304 (1947); *In re Contempt of Dougherty*, 429 Mich 81, 98; 413 NW2d 392 (1987).

Plaintiff fails to even address the character and magnitude of the harm threatened by the alleged continued contumacy. This would, indeed, place a difficult, if not impossible, burden on plaintiff, because the finished compost plaintiff alleges is on site would have no offensive odors, and does not pollute the air, waters, or land, and is not harmful in any way. Accordingly, in keeping with *United States v United Mine Workers,* plaintiff's motion to have defendants incarcerated should be denied in its entirety, along with plaintiff's request for reimbursement for costs.

IV. AS A MATTER OF PUBLIC POLICY, PLAINTIFF'S MOTION SEEKING DEFENDANTS' INCARCERATION AND REIMBURSEMENT FOR COSTS SHOULD BE DENIED

Plaintiff has motioned this Court to have defendants incarcerated for alleged continuing contempt of the February 27, 2008 Opinion and Order. However, in support of its motion for incarceration, plaintiff presents no proof of the assertion made. Plaintiff's motion is based solely on one statement made by counsel "on information and belief." Counsel attached no affidavit, no photographs attesting to a continuing willful violation of this court's order, and no

evidence of an individual with first-hand knowledge of the facts and circumstances of this assertion. As a matter of public policy, defendants submit that should be insufficient evidence to warrant taking away an individual's liberty.

When considering contempt proceedings, a trial court must seriously consider the alleged wrong, and weigh it against society's best interests. In the case at bar, defendants were initially held in contempt for keeping finished compost on their 300 acre farm.[2] Plaintiff now, without further proof of continuing contempt, wants defendants Ronald and Delores Michaels incarcerated. Yet, plaintiff fails to state the conduct which warrants incarceration. Plaintiff further omits any admissible proof of the alleged continuing contempt.

This is nothing more than a vexatious pleading filed by plaintiff against defendants. It should be identified as such. Plaintiff's request for an order incarcerating Ronald and Delores Michaels should be denied in its entirety, and Plaintiff's request for Defendants to reimburse the Township fees and costs within seven (7) days from the motion hearing date should be denied.

WHEREFORE, Defendants, Ronald Michaels and Dolores Michaels, respectfully request that this Honorable Court deny plaintiff's request for an order (a) incarcerating Ronald and Delores Michaels, and (b) requiring defendants to reimburse the Township fees and costs within seven (7) days from the motion hearing date, together with such other

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[2] It is undisputed that defendants stopped taking leaves, grass, yard clippings, and other compostable material onto their farm since December 31, 2005. There have been no odor complaints made respecting the Rondigo farm since 2005.

and further relief as to this Court may seem just and proper under the circumstances.

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